
APPELLANT PRO SE:

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# IN THE COURT OF APPEALS OF INDIANA

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| JAMES E. METZ, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 35A05-0712-PC-721 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Thomas M. Hakes, Judge
Cause No.35C01-0707-PC-4

**May 8, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary and Issue

Following a plea of guilty but mentally ill, James Metz was convicted of four Class A felonies and one Class C felony of child molesting. Metz was sentenced to fifty years for each Class A felony conviction and eight years for the Class C felony conviction, all sentences to be served concurrently pursuant to the plea agreement. Metz subsequently sought post-conviction relief, alleging ineffective assistance of his trial counsel in explaining the plea agreement, thereby leading to an involuntary plea. Metz appeals the post-conviction court's denial of his petition for relief, raising for our review the issue of whether the post-conviction court erred in denying his petition. Concluding that Metz failed to prove ineffective assistance of trial counsel, we affirm.

## Facts and Procedural History

In 1999, Metz was charged with five Class A felony counts of child molesting for acts committed against his children. His counsel negotiated a plea agreement pursuant to which Metz would plead guilty but mentally ill to four Class A felony counts and one Class C felony count of child molesting. The motion to enter a plea of guilty provides that in exchange for Metz's plea of guilty,

> the state has agreed that the sentences for each count should run concurrently, each with the other. Additionally . . . the state will **recommend** that the executed portion of [the] sentence will not exceed 30 years.

Appellant's Appendix. at 41 (emphasis in original). At the guilty plea hearing, it was established that Metz cannot read, but that he understood the proceedings, his rights, and the consequences of his plea. His counsel stated:

> I have had the opportunity just this morning to read to [Metz] the motion to enter a plea of guilty. [H]e's asked questions that indicate that he was aware of [the] nature of the documents and the plea bargain and I am of the opinion that he understands the nature and consequences of what we're doing here today and his plea.

Id. at 58. The trial court advised Metz of his rights, read the charges to him, and explained the range of possible sentences. The trial court then stated, "I also understand the State has agreed that all of these charges will be served concurrently." Id. at 64. After the State established a factual basis, Metz entered a plea of guilty but mentally ill to each charge.

At the sentencing hearing, Metz's counsel presented his argument as to sentencing and concluded by stating, "We would call to the Court's attention that we have a plea that provides for an agreed concurrent sentencing and a recommendation by the prosecuting attorney of a cap of 30 years . . . ." Id. at 78. The trial court sentenced Metz to fifty years for each Class A felony conviction and eight years for the Class C felony conviction, all to be served concurrently. Metz did not pursue a direct appeal of his sentence.

In 2001, Metz filed a petition for post-conviction relief, alleging ineffective assistance of trial counsel for misrepresenting the plea agreement. The post-conviction court ordered the case to be submitted by affidavit. Metz submitted an affidavit in which he averred that his counsel advised him that the State had agreed to a sentence cap of thirty years and that he entered the plea because he believed he would not receive a sentence in excess of thirty years. He further averred that if he had known he could receive a sentence greater than thirty years pursuant to the plea bargain, he would not have pled guilty. The State filed an affidavit by Metz's trial counsel, in which he averred that he explained the plea agreement to Metz and

reviewed and discussed the motion to enter a plea of guilty, which contained the agreement, with him prior to the guilty plea hearing. "Never during that meeting and our other meetings together did I tell Mr. Metz that he would not receive more than thirty (30) years executed . . . but that the State agreed to recommend that he receive no more than thirty (30) [years]." Id. at 37 (emphasis in original). The post-conviction court found that Metz "failed to show that there was a misrepresentation of the plea agreement" and "failed to carry his burden of proof." Id. at 33. Accordingly, the post-conviction court denied Metz's petition. Metz now appeals.

## Discussion and Decision

### I. Post-Conviction Standard of Review

Post-conviction procedures do not afford petitioners an opportunity for a "super appeal." Matheney v. State, 688 N.E.2d 883, 890 (Ind. 1997), cert. denied, 525 U.S. 1148 (1998). Rather, they create a narrow remedy for subsequent collateral challenges to convictions. Id. Those collateral challenges must be based upon grounds enumerated in the post-conviction rules. Id.; Ind. Post-Conviction Rule 1(1). The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. P-C.R. 1(5); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id.

## II. Ineffective Assistance of Counsel

To succeed on a post-conviction claim alleging a violation of the Sixth Amendment right to effective assistance of counsel, the petitioner must establish the two components set forth in Strickland v. Washington, 466 U.S. 668 (1984). Overstreet v. State, 877 N.E.2d 144, 151-52 (Ind. 2007). First, the petitioner must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment. Id. Second, the petitioner must show that the deficient performance prejudiced his defense. Id. This requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial, meaning a trial whose result is reliable. Id. To establish prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. Id. Further, counsel's performance is presumed effective, and the petitioner must offer strong and convincing evidence to overcome this presumption. Overstreet, 877 N.E.2d at 152.

Metz claims that his trial counsel was deficient because he misrepresented the nature of the plea agreement. Although the plea agreement clearly states that the State will recommend a sentence of no more than thirty years, Metz cannot read and contends that his counsel represented to him that the plea agreement capped his sentence at thirty years. The only evidence Metz offers to support his contention is his own affidavit. Metz's affidavit

includes the following paragraph:

> 4. On [J]anuary 10, 2000, counsel states at the sentencing hearing that the State had agreed to a cap of thirty (30) years.
>
> "We would call to the Court's attention that we have a uh, a plea agreement that provides for an agreed concurrent sentencing and a recommendation uh, by the prosecuting attorney of uh, a cap of 30 years . . . ."
>
> The petitioner contends that the plea was not intelligently and knowingly entered into because the plea had been misrepresented to him by the attorney when counsel told the petitioner that the state had agreed to a cap of thirty years and that he would not receive more than that.

Appellant's App. at 30. Metz's own affidavit belies his contention, relying on counsel's statement of a sentencing recommendation to prove his assertion that there was a sentencing cap. Metz may not have understood, but it is clear from the guilty plea proceedings as well as Metz's counsel's affidavit that Metz was advised that the thirty-year sentence was a recommendation only. At the guilty plea hearing, the court explained the sentencing parameters and referenced an agreement only that the sentences be concurrent. At the sentencing hearing, his counsel clearly pointed out that the State recommended a sentence of no more than thirty years. Metz at no time indicated that the agreement being discussed was not what he believed the agreement to be. Metz has failed to show that his counsel's performance was deficient.

Further, Metz has failed to demonstrate prejudice. He claims he would have asked counsel to negotiate a better plea bargain or would have gone to trial if he had been informed that the length of his sentence was not fixed by the plea agreement. However, he fails to show that the result of the proceeding would have been different. Metz apparently gave a statement to police after his arrest in which he admitted his conduct. Metz's counsel states in

his affidavit that the "evidence against Mr. Metz was strong, and there were no credible defenses available." Id. at 38. Pursuant to the plea agreement, one Class A felony count of child molesting was reduced to a Class C felony and the sentences were ordered to be served concurrently. In the absence of that plea agreement, Metz could have been convicted of five Class A felonies and could have been ordered to serve some or all of his sentences consecutively. Metz has not demonstrated any prejudice.

## Conclusion

Metz has failed to demonstrate that the evidence as a whole leads unerringly to a conclusion opposite that reached by the post-conviction court. The judgment of the post-conviction court is therefore affirmed.

Affirmed.

BAKER, C.J., and RILEY, J., concur.